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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 570

LORD MANUFACTURING COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Lord Manufacturing Company prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on July 11, 1949.

Opinion Below

The opinion of the Court of Claims (R. 88-101) is reported in 84 F. Supp. 748.

Jurisdiction

The judgment of the Court of Claims was entered on July 11, 1949 (R. 102). Petitioner's motion for a new trial, seasonably filed, was denied on October 3, 1949 (R. 102). By order of this Court on November 1, 1949, the time within

which to file a petition for certiorari was extended to and including February 16, 1950 (R. 217). The jurisdiction of this Court is invoked under the provisions of Section 1255 of the Judicial Code.

Questions Presented

The United States, by compulsory purchase and repricing orders, requisitioned petitioner's products. These products, which were patented, had been sold by petitioner in large quantities at prices fixed no later than 1939, except for some on which prices were later reduced. All prices were equal to or less than applicable OPA ceilings. In this suit to recover just compensation under the Fifth Amendment, the questions are:

1. Could the court below properly ignore the market price because under it petitioner's profits exceeded 10 percent?

2. Could the court below properly ignore the market price because it contained some element attributable to petitioner's patents on the ground that patents are "in the nature of a concession by the Government"?

3. Could the court below properly ignore the market price because the Government, by its power to allocate raw materials, might have prevented petitioner from producing the requisitioned products at all?

Statutes Involved

The actions of respondent which form the basis of this suit were taken under the authority of Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, as amended by 57 Stat. 164; 50 U. S. C. App. §309) and Title VIII of the Revenue Act of 1943 (58 Stat. 92; 50 U. S. C. App. §1192). The pertinent text of these statutes is reproduced in Appendices A and B hereto.

Statement

These are just compensation cases. Petitioner filed petitions and an amended petition in the Court of Claims (R. 1, 18) to recover the difference between what it asserts to be just compensation for certain of its products, and the amounts paid to it under the terms of two compulsory purchase orders and a repricing order issued by respondent.[1] The products in question were delivered to respondent under these orders. The lower court has held that the orders constituted takings of petitioner's property. With this holding, which is in full accord with the decision of this Court in *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220, petitioner agrees. Petitioner seeks review here of that part of the judgment of the court below which determines the amount of just compensation awarded to petitioner.

Petitioner is a Pennsylvania corporation primarily engaged in the manufacture of products known generally as bonded rubber shear type mountings. These mountings, which are composed of rubber securely united or bonded to mental, prevent the transmission of vibration from one metal part to another. The principal use of the products here involved is the protection of delicate instruments employed in aircraft, and the suspension of aircraft engines (Findings 1, 2, 3, 4, R. 31-34). Petitioner and its predecessors have been in the business of developing and manufacturing these and similar products since 1919. H. C. Lord, president of petitioner, was a pioneer in the field of vibration absorption, and from 1919 on had issued to him many patents based on his developments (Findings 1, 2, R. 31-32). Substantially all of petitioner's property taken by respond-

[1] The two proceedings below were consolidated for trial. Each involves the same questions, and may be considered here as one proceeding, as the court below did in its opinion.

ent for which just compensation is now sought was covered by patents owned by petitioner and granted long prior to the war (Finding 5, R. 34).[2]

Through petitioner's pioneering work, and its success in developing efficient mountings, it occupied a dominant position in the vibration mounting field from about 1932 until about 1942. When manufacturers began producing military aircraft in large numbers in the period from 1940 to 1944, petitioner's mountings were greatly in demand, since petitioner's name was known to airplane manufacturers by reason of prior dealings, its products had proved highly satisfactory in commercial aircraft, and they had been approved under the Army specifications (Finding 6, R. 34-35).

Although the superiority of petitioner's products had largely eliminated competing devices by 1932,[3] beginning in 1941, and thereafter from 1942 through 1944, no fewer than nine competitors manufactured and sold products similar to those of petitioner. While these competitive products met Army and Navy specifications, and generally gave satisfactory results, purchasers were often reluctant to take them rather than those made by petitioner, which were of a known high character and had been proved to be efficient by years of use. None of petitioner's competitors

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[2] Petitioner pleaded that its products were covered by its patents (No. 46573, Par. 21(d), R. 10; No. 47328, Par. 6, R. 19). Three of the major patents issued in 1930, 1932 and 1935 were admitted in evidence with testimony that they covered practically all of the products requisitioned by the respondent and the court so found (Finding 5, R. 34). The court below refused to make a finding on validity, considering it irrelevant (Finding 46, R. 82). Petitioner has assigned error to the refusal of the court below to find the patents valid. For purposes of the present proceeding, the patents must be assumed to be valid, for respondent put forward no evidence on patents and refused even to cross-examine petitioner's patent expert (R. 124).

[3] See Finding 4, R. 33. However, until at least 1938, Navy aircraft used a competitive product—the Lancaster mount—which cost about ten times as much as petitioner's product (*ibid.*).

had a comparable background of engineering experience and research. Petitioner also furnished to purchasers of its mountings engineering services which as a rule were not furnished by its competitors (Finding 9, R. 37-38).

None of petitioner's competitors manufactured a full line of mountings, but a substitute for or imitation of substantially all products made by petitioner and involved in this suit was made by at least one competitor.[4] Some of petitioner's competitors received the aid of Government financing and some, perhaps all, received from prime contractors blueprints and engineering assistance in the manufacture of their products (*cf.* Findings 46 and 47, R. 82-85). Petitioner received no financial assistance from respondent or any prime contractors and, since it had developed the products in question and owned the patents thereon, it did not receive blueprints or other engineering assistance from prime contractors.

Petitioner had established prices for most of its products here involved in 1933 (Exhs. 45-50, unpaginated Record volume), and, except for one general 15 percent increase on November 10, 1939, did not raise its price level at any time prior to the effective date of the takings herein (Finding 10, R. 38). In all cases, its prices were established before the United States entered the war (Finding 10, R. 38). These prices were not based on any fixed formula or percentage of profit but were based on the comparative advantage of petitioner's products (Finding 10, R. 38-39). During the war period, up to the time of the taking, the only change in peti-

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[4] See Findings 9, 46, 47, R. 37-38, 82-85. *Cf.* the articles included in the Army compulsory order (R. 181-183) and in the Navy compulsory order (Finding 19, R. 47-49), with the testimony (R. 106-107, 107-108, 109, 112, 118-119, 119, 121-122, 122-124, 124-125, 137, 138, 150, 162-163, 165, 166-167, 167-168, 172, 176). Petitioner is assigning error to the refusal of the court below to find that there was at least one competitor for substantially all of petitioner's products here involved. See petitioner's exception to Finding 9, R. 192.

tioner's prices was in June and July 1942 when petitioner *reduced* its prices on three of its most important products (dynafocal engine mounts) by an aggregate of more than 9 percent (Tabulation in Finding 45, R. 82). In addition, prices on certain dynafocal parts were reduced in August 1944 (Def. Exh. 44, R. 183-184). Petitioner seldom, if ever, reduced prices of dynafocal mountings to quantity purchasers (*cf.* Finding 10, R. 38).[5] By 1944 prices charged by competitors for similar products were in general lower than those charged by petitioner (Finding 10, R. 39). Nevertheless, because of various factors, including the proven character and familiarity of petitioner's products, the engineering services which petitioner rendered to its customers, and its patent position, it continued to supply approximately 60 percent of all similar products (*ibid.*).

The court below discussed at considerable length a long series of negotiations in which the Army and Navy unsuccessfully attempted to persuade petitioner to reduce its long-established prices (Findings 11-18, R. 40-47). These findings are wholly irrelevant here. Suffice it here to say that in April 1944 the United States Navy was seeking to purchase four items (a mounting and parts therefor) made by petitioner and also by certain of its competitors. Bids were submitted by petitioner and several competitors. The Navy preferred petitioner's product but objected to petitioner's prices, and determined to procure petitioner's mountings by means of an order designated as "Compulsory Order No. 2" (Finding 19, R. 47-49).

On May 19, 1944, petitioner received from the Under Secretary of War a similar order designated as "Compul-

[5] Finding 10 in terms relates to all petitioner's products. In fact, however, plate form mounting prices were *always* reduced for quantity, as respondents' own witness testified (see R. 164, 165). There is no evidence to the contrary in the record. Petitioner is assigning error to the failure of the lower court to make this distinction. See petitioner's exception to Finding 10 (R. 192-193).

sory Order No. W 33-038 ac-2753", which required petitioner to deliver to the War Department specified quantities of various types of mountings (Finding 22, R. 51-54).

Neither of these orders specified the prices which would be paid. Subsequent letters from the respective departments fixed the prices to be paid for the mountings included in these compulsory orders (Findings 24, 43, R. 55, 81). Petitioner did not accept the prices thus fixed (Findings 20, 24, 27, 43, R. 50, 55, 57, 81).

On September 23, 1944, the Secretaries of War and Navy jointly issued to petitioner, under the authority of Title VIII of the Revenue Act of 1943, an "Order Fixing Fair and Reasonable Prices" designated as "Army-Navy Joint Re-pricing Order No. 1" (Finding 38, R. 69-72). Attached to the joint order as Exhibit A was a list of 655 items manufactured by petitioner, together with the prices petitioner was thereafter required to charge for each such article furnished to the War and Navy Departments, either directly, or indirectly under subcontracts (Finding 38, R. 72). These prices were calculated to return petitioner's cost, as closely as it could be estimated, plus 10 percent of such estimated cost (Finding 37, R. 69). These prices were less than petitioner's prices, were not satisfactory to it, and were not agreed to by it (Finding 40, R. 74).

During the period October 2 to October 25, 1944, petitioner made shipments under the two compulsory orders and the joint repricing order and received payment therefor at the prices fixed by respondent in the manner described above (Finding 48, R. 85). The aggregate difference between that payment and petitioner's list price, which is here claimed as just compensation, is $512,534.09. This is the total amount involved in this proceeding (Finding 49, R. 87).

The prices fixed by respondent under Compulsory Order No. 2, Compulsory Order W 33-038 ac-2753, and by Army-

Navy Joint Repricing Order No. 1 were in every case substantially lower than the prices established by petitioner in November 1939, over two years prior to the entry of the United States into the war (Findings 10, 40, R. 38, 74; see Exhs. 45-50, unpaginated Record volume). The prices thus fixed by respondent were in all cases substantially lower than the ceiling prices for petitioner's products fixed by the Office of Price Administration, whereas petitioner's list prices were in all instances either equal to or lower than the OPA ceiling price.[6]

Petitioner's products were readily saleable at their established prices at all times material to the present suit (see Finding 9, R. 38). Indeed, during the period of the takings, petitioner had large amounts of unfilled list-price orders on hand (*cf.* Finding 36, R. 67, and R. 133).

On October 25, 1944, petitioner's plant was seized, and thereafter was operated by the Secretary of the Navy pursuant to executive order (Finding 42, R. 81). During the period of Navy operation, the Navy charged petitioner's established list prices for all deliveries made to civilian purchasers and Government departments other than the Army and Navy[7] (R. 120-121, 180-181).

The court below held that petitioner's products had been taken, within the meaning of the Fifth Amendment. It also held, however, that the amounts received by petitioner under the three compulsory orders constituted just compensation. While conceding that market value is ordinarily the best measure of just compensation, the court stated

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[6] See Max. Price Reg. 149, 7 Fed. Reg. 3889 (issued May 22, 1942), which fixed the ceiling price as the price charged on January 5, 1942. Petitioner has assigned error to the refusal of the court below to find that petitioner's products were subject to OPA ceilings, and that in each case the price set by petitioner was equal to or lower than the ceiling prices fixed (see petitioner's requested Finding 51, R. 195).

[7] Petitioner has assigned error to the refusal of the court below to make this finding (see petitioner's requested Finding 51, R. 195).

that there was no "free and untrammeled market" for petitioner's products because (1) the rubber used in petitioner's mountings was allocated by respondent and could not have been used by petitioner except in furtherance of the war effort, and (2) the mountings were "controlled" by patents which constituted a "concession" to petitioner by respondent. The court added that it was "unthinkable" that any plaintiff should receive as just compensation amounts that would give it a "profit" of more than 50 percent on cost when other businessmen "were willingly accepting" profits of 10 percent (R. 100-101).

Specification of Errors to Be Urged

The court below erred:

1. In failing and refusing to hold that the market price for petitioner's products existing at the time and the place of the taking was the proper measure of just compensation to petitioner.

2. In holding that the profit which petitioner would make was a basis for ignoring the existing market price.

3. In holding that, in the taking of patented products, any value attributable to the patents should be excluded in determining just compensation for the reason that patents are in the nature of a concessison by the Government.

4. In holding that the market price existing at the time and the place of taking could be ignored because the raw materials from which the products were made might have been, but were not, withheld from petitioner under the Government's wartime powers of allocation.

5. In failing and refusing to find that petitioner's patents covering the products here involved were valid.

6. In failing and refusing to find that virtually every

one of the products of petitioner here involved was also produced by one or more of petitioner's competitors.

7. In failing and refusing to hold that prices had been established by petitioner for most of its products here involved as early as 1933.

8. In failing and refusing to hold that petitioner did not at all times make price reductions for quantity purchases of plate form mountings.

9. In failing and refusing to hold that petitioner's products were each subjected to OPA ceiling prices, and that in each case the price set by petitioner was at or below the ceiling price.

10. In failing and refusing to hold that at the time petitioner's products were taken by respondent, they were readily saleable at their established prices and that the demand for them would continue.

11. In failing and refusing to hold that when, immediately after the taking here involved, respondent seized petitioner's plant, it continued to sell petitioner's products at petitioner's established prices to everyone except the Army and Navy.

12. In failing and refusing to hold that petitioner's established prices were not the proper measure of respondent's liability for the taking of petitioner's products.

13. In failing and refusing to give judgment for petitioner in the amount of $512,534.09, plus interest, representing the difference between what respondent has paid for petitioner's products, and the just compensation to which it is entitled therefor.

14. In entering judgments dismissing the petitions.

Reasons for Granting the Writ

Several times in the past few terms the Court has recognized, by reviewing on certiorari the decisions of lower courts, that the proper enforcement and application of the just compensation clause of the Fifth Amendment is of vital importance in constitutional litigation. *E.g., United States* v. *Toronto, Hamilton and Buffalo Navigation Co.*, No. 39, October Term, 1949, decided December 12, 1949; *United States* v. *Cors*, 337 U. S. 325; *United States* v. *John J. Felin & Co.*, 334 U. S. 624; *United States* v. *Petty Motor Co.*, 327 U. S. 372; *United States* v. *Miller*, 317 U. S. 369.

After both World Wars, the unusual circumstances and unusual needs of the Federal Government have required re-interpretation and reaffirmation of basic principles by this Court.

Such is the need here. The court below, as its opinion shows, was actuated by motives which on the surface appear commendable. But in striving to avoid what it conceived to be an injustice, it has in fact negated what Mr. Justice Douglas has called "the political ethics reflected in the Fifth Amendment." *United States* v. *Cors, supra,* at p. 332. In an opinion which appears to be flatly inconsistent with the opinions of this Court, the lower court not only denied just compensation to this petitioner, but also purported to establish principles which may be employed in the future, in other situations, to justify other confiscatory takings of property.

Petitioner's position, as respondent will no doubt stress, is unique or almost unique; only a few others, at most, were subject during the war to compulsory pricing orders. Yet when one examines the principles which the court below purports to establish, it is apparent that they are not confined in their application to this case, or to the situation created by the repricing statutes. Some of the principles

enunciated in the court's opinion apply to *all* takings, others to any taking of patented articles.

It is almost unnecessary to add that the decision is in probable conflict with several decisions of this Court.

I

The Decision Below Is in Probable Conflict With Several Decisions of This Court

United States v. *New River Collieries Co.*, 262 U. S. 341, is only one of many cases which make it clear that (p. 344):

> "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. * * * More would be unjust to the United States and less would deny the owner what he is entitled to."

That is not to say that "market price" is the only measure of value. There may be circumstances where some elements included in market value must be excluded—special values to the taker, or to the owner, for example. There may be no market price at all. But, as stated in an opinion of this Term (*United States* v. *Toronto, Hamilton and Buffalo Navigation Co.*, No. 39, decided December 12, 1949):

> "* * * the balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary 'market value' of the property taken. * * * Usually that is a practical standard; usually that approaches the 'just' compensation demanded by the Fifth Amendment."

Here there can be no doubt that a market price existed at the time and place of the taking, yet the court below ignored it. The reasons for ignoring it, so far as they can be extracted from the court's opinion, are wholly un-

supported by any decision of this Court. There are many decisions of this Court which are directly inconsistent. The result is a denial to petitioner of the compensation to which the Constitution entitles it.

A. There Was a Market Price for Petitioner's Products—Its List Price—Existing at the Time and Place of the Taking

Petitioner's property was taken by respondent between October 2 and October 25, 1944. In June 1944, as respondent's own evidence showed, petitioner had on its books more than $15,000,000 in unfilled orders at its prices (R. 133). Respondent's own accountants estimated, at that time, that petitioner's monthly sales volume of more than $2,700,000 would continue well into 1945 (R. 133). Although the Court of Claims refused to make appropriate findings (for which error has been assigned), it tacitly admitted the existence of the market for petitioner's products. Respondent has never challenged the fact that, absent the taking, petitioner could have, and would have, sold the requisitioned items at its list prices; indeed, it conceded this in its brief in the court below (p. 293).

We might well stop here, and proceed to the reasons upon which the court below relied in ignoring these market prices. There are, however, other factors which emphasize the propriety of the market price for petitioner's products as the measure of just compensation for these products.

1. *The OPA ceilings.*—As the Statement above shows (p. 8), the prices for all of petitioner's products were subject to OPA ceilings. In each case, the list, or market, price for the mountings was equal to, or lower than, the applicable ceiling. Under MPR No. 149 (7 Fed. Reg. 3889) ceiling prices were set at prices prevailing on January 5,

1942, and in no instance were petitioner's prices increased after that date. Some were lowered. There has been no claim by respondent that petitioner's list prices were illegal under OPA, and petitioner has never claimed that it should receive more than the OPA permitted. *Cf. United States* v. *John J. Felin & Co.*, 334 U. S. 624.[8]

2. *The history of petitioner's prices.*—A second factor of importance here is the conclusive proof that petitioner's list prices—the market value—were in no sense a reflection of wartime inflation. Petitioner fixed its prices for a great many of these products in 1933,[9] when it was actually operating at a loss (see Finding 6, R. 35). As has been shown in the Statement (*supra*, p. 5), the only increase in most prices was a flat 15 percent across-the-board increase in 1939. Prices on some of the most important mountings (dynafocals) were reduced in 1942. These products had been sold, for years prior to October 1944, at the price which petitioner now claims as just compensation. *Cf. United States* v. *Cors*, 337 U.S. 325.

3. *The existence of the market price after the taking.*—Lest there be any doubt as to the existence of a market price—petitioner's list price—at the time of the taking, it should be pointed out that *respondent itself* established petitioner's list prices as the prices for which it sold—except to its own military departments—the products of petitioner. Respondent operated and controlled petitioner's factory from October 25, 1944 through the Navy Department (Finding 42, R. 81). During the period from October 25, 1944 onward, the policy which was followed was stated to be

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[8] In its petition for certiorari in a case now pending before the Court (*United States* v. *Commodities Trading Corp.*, No. 156, October Term, 1949) the respondent stated (p. 18): "• • • properly established [OPA] ceiling prices reflect a fair market value, at least where active and substantial trading has taken place thereunder." See also p. 17.

[9] See Exhs. 45-50, unpaginated Record volume.

(R. 180): "all items sold for non-Army-Navy end-use, have been sold at the regular Lord Manufacturing Co. prices existent as of October 24, 1944." Employees of the Navy were ordered to make certain that all sales of petitioner's mountings for use by others than the Army or Navy were made at the identical list prices that respondent seeks to avoid paying as just compensation (see R. 180).

We have, in other words, the anomaly of the United States Government requisitioning property at a price far below that at which it was itself selling the identical property to some of its agencies and to the general public. There can be no clearer demonstration of the existence of the market value claimed here by petitioner, but denied by the court below.

B. The Record Supplies No Basis for Ignoring Market Value

The foregoing discussion demonstrates that there was a market value for the requisitioned property, which fairly represented "what a willing buyer would pay to a willing seller". *United States* v. *Miller*, 317 U.S. 369, 374. Petitioner's prices were not inflated by wartime conditions, or by the peculiar needs of the taker. They were not affected by any peculiar value of the property to the owner. This was a long-established market price, tested in both war and peace, which persisted even after the taking. And it was legal under OPA regulations. We submit that this market price *is* "just compensation", and that the purported bases upon which the court below rejected it were wholly unjustified. To them we now turn.

Fairly analyzed, the opinion below appears to advance three reasons for ignoring market price as the measure of just compensation. These were (1) "the *profits* which plaintiff demanded were all out of line with wartime conditions" (R. 101); (2) the products taken were covered by

patents, and patents are "in the nature of a concession by the Government" (R. 100); and (3) there was no "free and untrammeled market" because at the time of the taking there was a rubber shortage and petitioner "could not have secured . . . a single pound of rubber" for use in its mountings without the allocation of rubber made by respondent (R. 100). None of these reasons has any legal or logical validity.

1. *Profits are irrelevant to the determination of just compensation for property having a fair market value. The contrary holding of the court below is in probable conflict with decisions of this Court.*

The court below, in its long discussion of the efforts by Army and Navy procurement officers to negotiate a lower price; in its emphasis on the percentage and amount of profit that petitioner would make at its list prices; and in its statement that permitting petitioner such profits would be "unthinkable" (R. 101), has evidenced its preoccupation with facts that are legally irrelevant.

It is on this point that the conflict with the decision in *United States* v. *New River Collieries Co.*, 262 U.S. 341, is most apparent. In that case, the coal company proved the existence of a market price for the coal that had been requisitioned. In awarding that market price as just compensation, this Court stated (262 U.S. at p. 344):

> "The court below excluded evidence offered by the United States to show the owner's cost of production and a reasonable profit. This ruling was right, because it was shown beyond controversy that there were market prices prevailing when and where the coal was taken. The United States had the right to take the coal on payment of these prices; the owner was not entitled to more and could not be required to take less. The owner's cost, profit or loss did not tend to prove

market price or value at the time of taking, and was therefore immaterial."

Indeed, this must be so. Just compensation "is for the property, and not to the owner". *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326. The United States might well have requisitioned some of these mountings from a private person who had bought them from petitioner at list price. Even under the "profit" rationale advanced by the Court of Claims, that person would be entitled to just compensation measured by the list price, for which he could have sold the mountings.[10] Certainly it is not possible that just compensation for identical property can differ depending on the person from whom it is taken. "The public may not by any means confiscate the benefits or be required to bear the burden, of the owner's bargain." *Olson* v. *United States,* 292 U. S. 246, 255.

Cost-plus-reasonable-profit has never been even evidence of just compensation when a market price exists. "It is the property and not the cost of it that is safeguarded by state and federal constitutions." *Olson* v. *United States, supra,* at p. 255. The decision below is in conflict with this well-settled principle.

This is not to say that the Government cannot make "profits" in wartime a matter of its proper concern. Both by the excess profits tax, and by processes of renegotiation, the amount of profit permitted to a person or business has been subjected to control. It is wholly unnecessary to pervert the concept of just compensation guaranteed by the Fifth Amendment in a mistaken effort to protect the public welfare. The task of the court below was to establish the pecuniary equivalent of the property taken, not to pass judgment on how much of that pecuniary equivalent

[10] Conceivably, the Court of Claims would award him a "reasonable profit" in addition.

this particular petitioner was entitled to have. That function, apart from the tax statutes, has been assigned to administrative officials and, failing agreement on their determination, to the Tax Court, which has its own rules, principles and standards. The Tax Court procedures have been approved by this Court, but no one heretofore has suggested that they are the rules by which just compensation is to be determined when property is requisitioned. Plainly, they are not, and no amount of hyperbole can make profit relevant in this case.

2. *Patents are not "concessions" by the United States which may be revoked or ignored when it takes property. The contrary holding of the court below is in probable conflict with decisions of this Court.*

The Court of Claims implied that part of what it deemed the excessive market value of petitioner's property was attributable to the patents covering that property. This is undoubtedly the fact. But, the court held, the contribution of the patents to this market price must be disallowed because patents are "in the nature of a concession by the Government" (R. 100). This conclusion is incorrect, both as a statement of law, and as a reason for disregarding market value.

The Congress is authorized by Article I, Section 8 of the Constitution to make laws "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries". The patent statutes enacted pursuant to this authority accordingly grant to inventors the means of securing limited monopolies for limited periods of time. Congress has seen fit to attach no strings to the patents issued under these laws: "The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences." *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U.S. 327,

330-331. Because of that fact, this Court has repeatedly held that the United States has no more right to the free use of the invention secured by a patent granted by it than has any private person. See *Belknap* v. *Schild*, 161 U.S. 10, 15-16, and cases there cited. It must purchase rights to the invention or pay just compensation therefor.

The holding of the court below that patents are a "concession" which can be withdrawn or revoked by the United States is in probable conflict with many decisions of this Court. We have already referred to *Belknap* v. *Schild, supra*. *Crozier* v. *Krupp*, 224 U.S. 290, is a landmark opinion in this field. In *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28, 39-40, the law was deemed so well settled as to warrant the following statement in a unanimous opinion:

> "At the time of the enactment of the law of 1910 the following principles were so indisputably established as to need no review of the authorities sustaining them * * * (a) That rights secured under the grant of letters patent by the United States were property and protected by the guaranties of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation."

Again, and more recently, in *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, the Court stated (p. 189):

> "The title of a patentee is subject to no superior right of the Government. The grant of letters patent is not * * * a matter of grace or favor * * *. And this court has held that the Constitution evinces no public policy which requires the holder of a patent to cede the use or benefit of the invention to the United States, even though the discovery concerns matters which can properly be used only by the Government; as, for example, munitions of war."

Moreover, there is no warrant whatever for holding that because an article is patented, *ipso facto* no "free

and untrammeled" market price exists, and that therefore just compensation must become cost-plus-reasonable-profit. In the first place, the statutory monopoly granted by petitioner's patents had no effect upon the market for petitioner's products insofar as Government end use was concerned, since under the Act of 1910 (35 U.S.C. § 68) the Government could, and did, authorize manufacture by infringers.[11] There was, accordingly, a free and untrammeled market in which competitors of petitioner could and did manufacture and sell patented inventions for Government end use.

In the second place, even as to civilian use, the most that can be said is that petitioner's patents helped to make its products unique, for no less than nine competitors were able to make imitations and substitutes. If there was no "competitive" market in respect to civilian use, it was because the other manufacturers could not make mountings of the same quality or under the same patents (see Finding 9, R. 38). But the advantage which petitioner's patents gave it was an advantage to which petitioner is fully entitled by the patent laws. As this Court stated in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 65:

> "To say that the world is not recompensed for the price it pays [for a patented product] is to attack the policy of the law, is to defy experience and to declare that the objects of inventive genius all around us have contributed nothing to the advancement of mankind."

See, to the same effect, *United States* v. *General Electric Co.*, 272 U.S. 476, 490; *United States* v. *Line Material Co.*, 333 U. S. 287, 319.

The facts of this case bear out this common experience. Petitioner, here, has done exactly what is contemplated by

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[11] Petitioner's only remedy for this Government-authorized infringement was by suits in the Court of Claims. Two suits are now pending in that court on these infringements. Docket Nos. 47714, 47715.

the Constitution and the patent statutes. Without cross-licenses, patent pooling, or any of the other latter-day refinements, it has made and sold the inventions patented and has built up a business in these inventions upon the grant by the United States of the exclusive right to make, use and vend the inventions. These inventions certainly promoted the progress of science and useful arts. Petitioner's customers preferred its mountings, at its prices, to the substitutes offered by competitors, and had bought them in large quantities for many years before the takings here (Findings 6, 9, R. 34-35, 38). The Navy Department, in taking some of the property involved in this very case, preferred to embark upon the long and cumbersome process now here ending to obtain petitioner's mountings rather than to purchase substitutes offered to it at a lower price (Finding 19, R. 47). These facts demonstrate the advantage which petitioner's patents gave it and to which it was lawfully entitled. We search the opinions of this Court in vain for any authority even suggesting that this advantage may constitutionally be ignored in determining just compensation.

3. *The fact that rubber was allocated to petitioner is of no significance*

The opinion of the court below states (R. 100):

> "It is true that frequently market value is the best yardstick for determining just compensation, and is therefore usually applied where there is a free and untrammeled market. But here there was no such market. As a matter of fact, there was a tremendous shortage of rubber and every pound of that rubber was needed in the war effort. The need was so great that it was completely controlled by allocation. Therefore, unless plaintiff's business were linked to the war effort it could not have secured or used a single pound of rubber."

With due deference, that is a complete *non sequitur*. There is no evidence in the record, nor has respondent ever asserted, that the wartime shortage of rubber had anything to do with the level of the market price for the products here involved. Indeed, there is a specific finding that petitioner's prices had been set in a peacetime market years prior to the time of the taking (Finding 10, R. 38), and in many cases had been changed only once since 1933 (*cf.* Exhs. 45-50, unpaginated Record volume).

It is quite true that no one should be permitted to advantage himself from an artificially high price level caused by wartime needs of the Government. *United States* v. *Cors*, 337 U.S. 325. But it is equally true that the Government cannot set its own valuation—for just compensation purposes—on requisitioned property simply because it could have kept that property from coming into existence by exercise of its lawful powers of allocation. *Cf. International Paper Co.* v. *United States*, 282 U.S. 399, 408. Yet on the facts in this case, that is what the Court of Claims has held.

II

The Questions Involved Are Important

In *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324, Mr. Justice Brewer introduced his discussion of just compensation by stating:

> "Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

This is not to say that this Court should review all just compensation cases. It should, however, recognize that such cases do present a matter of special concern; a matter in which this Court should be alert to prevent injustice. Most of the recent cases in which review by this Court has been granted have been those in which the United States complained of the injustice of a just compensation award (see p. 11, *supra*). It is equally important, of course, that injustice not be imposed upon the claimant, and that no principle be established which will impair the guarantees of the Fifth Amendment.

The matter is particularly important because the Court of Claims is the forum in which the large majority of significant just compensation cases are heard and decided. Many such cases arising out of the recent war are pending there now; many others will no doubt be filed within the six years following the end of the war. If this decision is permitted to stand, it may well be deemed to have established principles which will seriously jeopardize the rights of future claimants, and to have qualified principles and precedents enunciated in many opinions of this Court.

If, as we believe, the principles which the court below has enunciated in this case are wrong, present review and correction by this Court are fully warranted.

Conclusion

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 30, 1949.

APPENDIX A

Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, as amended by 57 Stat. 164; 50 U.S.C. App. § 309) provides as follows:

"Sec. 9. The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execu-

tion of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

"The first and second provisos in section 8 (b) of the Act entitled 'An Act to expedite national defense, and for other purposes', approved June 28, 1940 (Public Act Numbered 671, Seventy-sixth Congress), are hereby repealed. * * *"

APPENDIX B

Title VIII of the Revenue Act of 1943 (58 Stat. 92; 50 U.S.C. App. § 1192) provides as follows:

"TITLE VIII—REPRICING OF WAR CONTRACTS

"SEC. 801. REPRICING OF WAR CONTRACTS.

"(a) As used in this section the terms 'Department', 'Secretary' and 'article' shall have the same meanings as in subsection (a) of the Renegotiation Act.

"(b) When the Secretary of a Department deems that the price of any article or service of any kind, which is required by his Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with his Department or of any subcontract thereunder, is unreasonable or unfair, the Secretary may require the person furnishing or offering to furnish such article or service to negotiate to fix a fair and reasonable price therefor. If such person refuses to agree to a price for such article or service which the Secretary considers fair and reasonable, the Secretary by order may fix the price payable to such person for furnishing such article or service after the effective date of the order, whether under existing agreements or otherwise. The order may prescribe the period during which the price so fixed shall be effective and such other terms and conditions as the Secretary deems appropriate.

"(c) Any person aggrieved by an order fixing a price under this section may sue the United States in any appropriate court. In such suit, such person shall be entitled to recover from the United States the amount of any difference between (1) fair and just compensation for the articles and services furnished under the terms of the order and (2) the price fixed for such articles and services by the order; but if the prices so fixed by the order are found to exceed fair and just

compensation for such articles and services, such person shall be liable to the United States in such suit for the amount of this excess. Any such suit shall be brought within six months after the order by the Secretary on which it is based, or after the expiration of the period or periods specified in such order, whichever last occurs. Such a suit shall not stay the order involved.

"(d) Whenever any person wilfully refuses, or wilfully fails to furnish any such articles or services at the price fixed by an order of the Secretary in accordance with this section, the President shall have power to take immediate possession of the plant or plants of such person and to operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended.

"(e) The authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

"(f) Every purchase order or agreement, or contract to make or furnish any article or service of any kind, which is required by a Department or directly or indirectly required, furnished or offered in connection with, or as a part of, the performance or procurement of any contract with such Department or of any subcontract thereunder, shall, if made thirty days or more after the date of the enactment of this Act, be deemed to contain a provision under which the person making or furnishing such article or service agrees that notwithstanding other provisions of the purchase order, agreement, or contract, he shall be entitled to receive for such article or service only the fair and just compensation provided for in subsection (c).

"SEC. 802. EFFECTIVE DATE.

"(a) Section 801 shall be effective from the date of the enactment of this Act.

"(b) Section 801 shall not apply to any contract with a Department or any subcontract made after the date proclaimed by the President as the date of the termination of hostilities in the present war or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier."